No. 07-308

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

CLINTWOOD ELKHORN MINING COMPANY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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## REPLY BRIEF FOR THE UNITED STATES

The question here is not whether the underlying tax is constitutional under the Export Clause or whether taxpayers may pursue timely claims for refund of unconstitutionally collected taxes. Cf. Br. in Opp. 1-2. The question instead is whether the comprehensive, carefully-reticulated remedial scheme created by Congress to govern claims for refunds of erroneously or illegally collected taxes is exclusive of the more generous statutory remedial scheme in the general provisions of the Tucker Act. The Federal Circuit, by allowing respondents to pursue monetary claims using the Tucker Act's general six-year statute of limitations, permitted respondents to circumvent the restrictions that Congress imposed on the United States' waiver of sovereign immunity from suits to recover overpayments of tax. The court of appeals allowed respondents not only to evade the tax-refund remedy's mandatory administrative-claims process and shorter statute of limitations, but also to bene-

fit from one portion of that remedy—the allowance of interest—despite their failure to comply with the requirements of Congress's carefully-reticulated remedial scheme. That holding cannot be squared with this Court's precedents. See, *e.g.*, *Hinck* v. *United States*, 127 S. Ct. 2011 (2007); *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763 (2007); *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941); *United States* v. *New York & Cuba Mail S.S. Co.*, 200 U.S. 488 (1906).

Rather than make any serious attempt to defend the correctness of the judgment below, respondents devote the bulk of their response to the contention that this case is not worthy of this Court's review. As explained in the petition (Pet. 24-26), and as further explicated below, respondents are mistaken. The United States faces substantial liability in this case and numerous similar cases due to the Federal Circuit's failure to follow this Court's precedents. And, contrary to respondents' suggestion (*e.g.*, Br. in Opp. 6), the effect of the Federal Circuit's error is not limited to the specific context here.

The Court need not grant plenary review at this juncture, however, because the Federal Circuit issued its decision without the benefit of this Court's analysis in *Hinck* and *EC Term of Years*. As the petition explains (Pet. 8-16), the decision below is irreconcilable with the rule of law stated (and applied to the tax context) in those cases, namely, that "in most contexts, 'a precisely drawn, detailed statute pre-empts more general remedies.'" *Hinck*, 127 S. Ct. at 2015 (quoting *EC Term of Years*, 127 S. Ct. at 1767). Accordingly, it would be appropriate to vacate the judgment and remand for reconsideration in light of those decisions.

## I. THE DECISION BELOW IS IRRECONCILABLE WITH THIS COURT'S PRECEDENTS, INCLUDING THE INTERVENING DECISIONS IN *HINCK* AND *EC TERM OF YEARS*

A. 1. Respondents contend that *Hinck* and *E.C. Term of Years* do not "speak[] directly to the question presented here." Br. in Opp. 12. Short of answering the precise question presented, however, it is difficult to see how those cases could be more on point. In both of those cases, as here, the plaintiffs sought to evade the statutory restrictions that Congress placed in the Internal Revenue Code on the ability to sue the United States. In both cases, as here, the plaintiffs sought to resort to the relatively more generous terms of the Tucker Act. *Hinck*, 127 S. Ct. at 2016; *EC Term of Years*, 127 S. Ct. at 1767. And, in both cases, this Court rejected those attempts based on the governing legal principle that the Federal Circuit failed to apply here: when Congress has created a comprehensive remedial scheme addressed to the plaintiff's situation, the plaintiff cannot circumvent the restrictions on that remedy by resorting to general (and more generous) remedial provisions.

In *EC Term of Years*, this Court rejected a party's attempt to resort to the longer statute of limitations available under the Tucker Act to challenge a government tax levy. 127 S. Ct. at 1766-1767 & n.2. The Court reasoned that such parties must pursue their claims under the wrongful-levy statute, 26 U.S.C. 7426; otherwise, such plaintiffs "could effortlessly evade the levy statute's 9-month limitations period." 127 S. Ct. at 1767-1768. Similarly, in *Hinck*, this Court rejected an attempt by a taxpayer to avoid Congress's limitations on judicial challenges to the IRS's refusal to abate interest, 26 U.S.C. 6404(h) (Supp. IV 2004), by resorting to the general provisions of the Tucker Act. 127 S. Ct. at 2014-2018; see Pet. 9-10. In so concluding, the

Court held that the taxpayer could not rely on one portion of the specific remedial scheme—the standard of review—while avoiding the "limiting features" that Congress placed on that remedial scheme, including a shorter statute of limitations. 127 S. Ct. at 2015.

Here, the court of appeals sanctioned precisely the sort of circumvention condemned by this Court in *EC Term of Years* and *Hinck*. It allowed respondents to pursue their monetary claims for a tax "refund" (Pet. App. 37a-38a)—including interest on their "overpayment" of tax—under the general provisions of the Tucker Act, rather than the comprehensive, and carefully-reticulated, remedial provisions for tax-refund claims. See *id.* at 2a-6a. The court of appeals thereby allowed respondents to evade the Internal Revenue Code's mandatory administrative-claim requirement, which provides that "[*n*]*o suit* or proceeding shall be maintained in *any court* for the recovery of *any internal revenue tax* alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with" the IRS. 26 U.S.C. 7422(a) (emphases added); see Pet. 10-16. The court also permitted respondents to circumvent the relatively shorter, and detailed, time limitations set forth for administrative-refund claims and subsequent judicial proceedings. See 26 U.S.C. 6511(a) and (b), 6532(a)(1) and (2).

Moreover, the court permitted the kind of picking and choosing condemned in *Hinck* by allowing respondents to collect interest available only under the tax-refund remedy, while avoiding the limitations on that remedy. Thus, the decision below went beyond the Federal Circuit's erroneous holding in *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001). The court allowed respondents "to isolate one feature of th[e] 'precisely drawn, detailed'" tax-refund remedial scheme—

the allowance of interest—without requiring them to comply with the limitations of that scheme, notwithstanding that "Congress plainly envisioned [the remedy] as a package deal." *Hinck*, 127 S. Ct. at 2016.[1]

2. Respondents attempt to distinguish *Hinck* and *EC Term of Years*, asserting that those cases "involved choosing between two alternative statutory procedures for enforcing a purely *statutory* claim for relief," whereas respondents sought to "vindicat[e] a *constitutional* right." Br. in Opp. 12. But, notwithstanding the constitutional origins of respondents' claims, this case presents a choice "between two alternative statutory procedures"—the comprehensive remedy created by the tax-refund provisions (with its benefits and restrictions) versus the general grant of jurisdiction under the Tucker Act (with its longer statute of limitations).[2] Contrary to respondents' assertion (*ibid.*), the tax-refund remedy does not "displac[e] any constitutional causes of action." Rather, the tax-refund remedy establishes procedural prerequisites to federal-court jurisdiction over *any* cause of action—whatever its source—for the refund of "any internal revenue tax alleged to have been erroneously or illegally assessed or collected." 26 U.S.C.

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[1] Contrary to respondents' assertion (Br. in Opp. 15-16), the plain text of the statute does not authorize interest on awards of money damages generally, but only on "*overpayment[s]* in respect of any internal-revenue tax." 28 U.S.C. 2411 (emphasis added).

[2] Respondents are incorrect in suggesting (Br. in Opp. 13) that the only difference between the two remedial schemes is "a somewhat shorter limitations period"; respondents' preferred remedy also permits them to evade the entire administrative-claims procedure carefully crafted by Congress. See Pet. 10-12. In any event, a "shorter limitations period" is no small matter in determining whether Congress intended a particular remedy to be exclusive. See *EC Term of Years*, 127 S. Ct. at 1767; see also *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 122-123 (2005).

7422(a); see 26 U.S.C. 6511(a) and (b), 6532(a)(1) and (2). The tax-refund remedy, moreover, is fully applicable to constitutional claims. *E.g.*, *United States* v. *IBM*, 517 U.S. 843 (1996) (Export Clause challenge). Indeed, respondents' successful claims for refunds (with interest) for the tax years in which they did file timely administrative-refund claims demonstrate that the tax-refund remedy is available for the type of claims here. Pet. App. 4a.[3]

If anything, the fact that respondents' underlying claim for relief is a constitutional one further undercuts their position. The question is not whether Congress intended to "foreclose a remedial mechanism created by the Constitution itself." Br. in Opp. 12. The question is instead whether the Federal Circuit should have recognized an implied right of action directly under the Constitution when Congress had already created a comprehensive scheme to vindicate that constitutional right. This Court held in *Bush* v. *Lucas*, 462 U.S. 367 (1983), that the answer to that question is no, even if the specific remedy is "not as effective" as one directly under the Constitution might be. *Id.* at 372. Respondents do not cite, much less attempt to distinguish, that decision.

Respondents (Br. in Opp. 12) point to *Smith* v. *Robinson*, 468 U.S. 992 (1984), but that case merely confirms that the decision below is erroneous. In *Smith*, this Court held, "[i]n light of the comprehensive nature of the procedures and guarantees" in the Education of the Handicapped Act, including its administrative-review process, *id.* at 1011, that a plaintiff could not circumvent that "carefully tailored scheme," *id.* at 1012, by bringing a constitutional claim un-

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[3] Respondents are thus incorrect in suggesting (Br. in Opp. 13) that the Export Clause is the appropriate comparison in deciding what is the more "targeted" remedy.

der the general provisions of 42 U.S.C. 1983. See *Smith*, 468 U.S. at 1010-1013.

Moreover, respondents' reliance (Br. in Opp. 12) on *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), is misplaced. In *United States Shoe*, this Court affirmed the Court of International Trade's jurisdiction to hear a tax-refund suit attacking the constitutionality of the Harbor Maintenance Tax. *Id.* at 365-366. But the usual prerequisites for tax-refund actions were expressly inapplicable to the specific statutory provisions at issue there. See 26 U.S.C. 4462(f)(3) (providing that the Harbor Maintenance Tax "shall not be treated as a tax for purposes of subtitle F [which includes 26 U.S.C. 6511, 6532, and 7422] or any other provision of law relating to the administration and enforcement of internal revenue taxes"). *United States Shoe* thus provides no support for the decision below.

Respondents' reliance on *United States* v. *Hatter*, 532 U.S. 557 (2001), fares no better. As respondents acknowledge (Br. in Opp. 12), this Court did not consider whether the tax-refund remedial scheme was the exclusive remedy for the claim in that case, which involved whether the imposition of certain Medicare and social security taxes on Article III judges unconstitutionally diminished their salaries. *Hatter*, 532 U.S. at 561, 564. Moreover, in stark contrast to this case, the Federal Circuit concluded in *Hatter* that the plaintiffs did "not seek tax refunds, but compensation to ensure compliance with Article III, § 1." *Hatter* v. *United States*, 953 F.2d 626, 630 (Fed. Cir. 1992). Here, the complaint expressly sought "damages consisting of a refund" (Pet. App. 37a-38a); the court of appeals characterized respondents' relief as a "repayment" and "recovery" of their taxes (*id.* at 1a-2a); and the court awarded interest "on the refunded export taxes" on the theory that the judgment was "for" an "overpayment" of tax (*id.* at 6a).

B. Respondents implicitly concede that the decision below cannot be reconciled with this Court's decisions in *A.S. Kreider* and *New York & Cuba Mail*. As demonstrated in the petition (Pet. 19), *New York & Cuba Mail* holds that a taxpayer seeking to bring an Export Clause claim cannot evade a prerequisite to a tax-refund suit by relying on the general jurisdictional provisions of the Tucker Act. 200 U.S. at 494-495. But that is precisely what the Federal Circuit has sanctioned here. Similarly, in *A.S. Kreider*, this Court held that a taxpayer could not circumvent the shorter limitation period for tax-refund actions by relying on the "outside limit" expressed in the Tucker Act's general six-year limitation period. 313 U.S. at 447. The current six-year limitation (28 U.S.C. 2501) is similarly worded as an "outside limit"—an assertion respondents do not contest—yet the Federal Circuit impermissibly allowed respondents to rely on that outer limit. See Pet. 21.

Rather than attempt to defend the Federal Circuit's decision in the face of *A.S. Kreider* and *New York & Cuba Mail*, respondents suggest (Br. in Opp. 14-15) that the Court should deny certiorari because it declined to review the Federal Circuit's earlier decision in *Cyprus Amax*. But unreviewed Federal Circuit decisions do not lessen the force of this Court's precedents. At a minimum, respondents' argument provides no reason not to vacate and remand in light of last Term's intervening decisions. In addition, that argument fails to acknowledge that, relative to *Cyprus Amax*, the decision below represents an even greater divergence from this Court's precedents, because the court of appeals has compounded its error by allowing respondents to recover interest on their "overpayment" of "tax" (Pet. App. 6a), while still maintaining (*id.* at 2a-3a) that this is not a "suit" for the "recovery of any internal

revenue tax" subject to the exclusive tax-refund remedial scheme. 26 U.S.C. 7422(a).

## II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS ACTION BY THIS COURT

Respondents assert (Br. in Opp. 6) that whether a violation of the Export Clause should be vindicated through the general provisions of the Tucker Act, rather than the specific provisions of the Internal Revenue Code, "almost never arises." But that is because, before the Federal Circuit's decision in *Cyprus Amax*, no prudent taxpayer would have risked failing to obey the jurisdictional prerequisites of the Internal Revenue Code. Following the decision below, the door is open not only to untimely tax-refund claims that can be framed as constitutional claims, but also to an award of interest on such claims, even if the taxpayer fails to file a timely administrative-refund claim.

Contrary to respondents' assertions (Br. in Opp. 6-10), the court of appeals' failure to apply the "well-established principle that, in most contexts, 'a precisely drawn, detailed statute pre-empts more general remedies,'" *Hinck*, 127 S. Ct. at 2015, is having significant negative repercussions, and not simply in cases presenting the precise issue here. As noted in the petition (Pet. 25), this case is one of many presenting the same issue, in which the United States faces untimely refund claims totaling tens of millions of dollars.[4] And, contrary to respondents' suggestion that no new such suits can now be filed (*e.g.*, Br. in Opp. 6), a coal producer filed such a suit on January 30, 2007. See *Kanawha Eagle Coal, LLC* v. *United States*, No. 07-74 T (Fed. Cl.).

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[4] Although the petition asserted (Pet. 7, 25) that there were "more than" 25 other cases, the government has concluded upon further review that there are exactly 25 other cases, all of which remain pending in the courts below.

Moreover, this is not the only context in which the Federal Circuit has made the same error. In *Consolidation Coal Co.* v. *United States*, 351 F.3d 1374 (Fed. Cir. 2003), the Federal Circuit relied on its decision in *Cyprus Amax* to allow plaintiffs to resort to the Tucker Act's general jurisdictional provisions to recover reclamation fees paid to the United States pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA). *Id.* at 1378-1381. The plaintiffs alleged that the reclamation-fee regulation promulgated by the Department of Interior violated the Export Clause. *Id.* at 1378-1379. The Federal Circuit allowed that challenge to proceed in the Court of Federal Claims, despite language in the statute expressly providing that "'[a]ny action by the Secretary promulgating national rules or regulations [under the SMCRA] shall be subject to judicial review in the United States District Court for the District of Columbia,' and that '[a] petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action.'" *Id.* at 1381 (quoting 30 U.S.C. 1276(a)(1)). Nearly ten similar cases are now proceeding in the courts below under the authority of *Consolidation Coal.*

*Consolidation Coal* is imbued with the same mistaken reasoning as the decision below, and refutes respondents' suggestion that the issue here is a contained one of only diminishing future significance.[5] The holdings of the Federal Circuit below and in *Cyprus Amax* are patently incorrect, irreconcilable with intervening precedents of this

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[5] Although respondents assert (Br. in Opp. 9-10) that the Federal Circuit has "repeatedly refused to extend the *Cyprus Amax* decision," none of the four cases they cite expressly rejects an argument for the extension of *Cyprus Amax*, and *Consolidation Coal* is just such an extension.

Court, and of recurring importance in ongoing litigation. Further review is warranted.

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For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *EC Term of Years* and *Hinck*. In the alternative, the Court may wish to consider summary reversal, or the petition should be granted and the case set for briefing and oral argument.

Respectfully submitted.

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